No. 80-1106

In the Supreme Court of the United States

OCTOBER TERM, 1980

AUGUSTINE CASTELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his conviction for attempted income tax evasion on the ground that the trial judge erroneously excluded evidence bearing on his lack of criminal intent.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was acquitted on two counts of attempted income tax evasion for 1973 and 1974, in violation of 26 U.S.C. 7201, and convicted on a third count of attempted income tax evasion for the year 1975 (A. 2a).[1] The district court sentenced him to a four-year prison term, which was suspended on condition that petitioner serve 179 days in a "jail-type institution," placed him on five years' probation, and fined him $250 (*ibid*). The court of appeals affirmed (Pet. App. 1a-2a).

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[1] "A." refers to petitioner's appendix in the court of appeals. "Tr." refers to the trial transcript.

At trial, the government proved the understatement of taxable income and tax liability through use of the bank deposits plus cash expenditures method of proof. The government's expert accounting witness calculated, *inter alia,* that during 1975 petitioner's actual gross receipts exceeded his reported gross receipts by $749,933.24 (Tr. 122). He found that petitioner had unreported taxable income of $78,856.33 for 1975 and determined that his tax deficiency for that year was $31,498.57 (Tr. 121-123). An accountant who testified on behalf of petitioner conceded that, according to his calculations, petitioner had unreported taxable income of $58,743.97 for 1975, an amount almost twice as large as his reported taxable income ($32,662.79) for that year (Tr. 238).

1. Petitioner contends (Pet. 15) that "in derogation of * * * [his] right to confront and cross-examine witnesses" under the Sixth Amendment, the trial judge sustained the government's objection to a "line of cross-examination" of the preparer of his return (Donald Larva) regarding "the difference between the cash method and accrual method [of accounting] only as they related to * * * [his] contention that the Mellon Account was nothing but a 'wash' account." The so-called "Mellon Account" was a business checking account that petitioner opened in 1965 at the Mellon Bank (Tr. 65). When petitioner employed Larva to prepare his returns for 1973-1975, he turned over to Larva a checkbook relating only to a business checking account which he maintained at Pittsburgh National Bank (PNB), despite the fact that, during those years, he had deposited more into the Mellon Account than double the amount of receipts that he had deposited into the PNB Account (Tr. 20-21, 26). It was not until June 1976, after the Internal Revenue Service informed petitioner that he would be audited for 1974, that

he disclosed the existence of the Mellon Account to Larva (Tr. 26).[2] Larva testified (Tr. 28-29) that, after having been informed of the existence of the Mellon Account, he was compelled to recompute petitioner's income for the first six months of 1976. He then confirmed (Tr. 29) that the information from the Mellon Account "reflected additional income." It is with respect to this testimony that counsel for petitioner sought to elicit information from Larva regarding the accrual and cash methods of accounting in order "[t]o rebut any criminal inference and at the same time to advance the defense that Petitioner had no criminal intent to evade or defeat his income taxes for any year" (Pet. 14).

In sustaining the government's objection to cross-examination regarding the cash and accrual methods, the trial judge did not deprive petitioner of his Sixth Amendment right to confront and cross-examine witnesses. On cross-examination, Larva was permitted to describe the differences between the two methods of accounting (Tr. 30). The government objected only when it became clear that "defense counsel's questions * * * [were] designed to inject into the case the so-called shift of accounting method to try to minimize the unreported income or shift it from one year to another by changing the accounting method" (Tr. 31). Although petitioner had determined his income for the years in question on the cash basis of accounting (Tr. 19), at trial he attempted to prove lack of criminal intent by showing that disbursements from the Mellon Account cancelled out deposits under the accrual method of accounting, thus creating a "wash". However, the law precludes proof that a

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[2]Larva testified (*ibid.*) that "before that date [of audit] came about, Mr. Castelli called me into his office, and he said 'Don, you're in the clear', something to that effect, 'but I have another checkbook that I never gave you.' "

different method of accounting, such as the accrual method, could have been used, because the offense charged must be weighed against what was done, and not against what might have been done. See, *e.g.*, *Fowler* v. *United States*, 352 F. 2d 100, 103 (8th Cir. 1965); *United States* v. *Vardine*, 305 F. 2d 60, 64 (2d Cir. 1962); *Clark* v. *United States*, 211 F. 2d 100, 105 (8th Cir. 1954). At all events, the trial judge did not foreclose Larva from testifying as a defense witness to describe the differences between the cash and accrual methods; in fact, he suggested that defense counsel call Larva as an expert (Tr. 34). However, after serving a subpoena upon Larva (Tr. 60, 63, 141-142), the defense chose not to call him.

2. Petitioner further contends (Pet. 16) that the trial judge improperly precluded him from cross-examining Larva with respect to his 1976 tax return "in the apparent misconception advanced by the Government that Petitioner was seeking to vary his method of accounting from the cash method to the accrual method". But the record shows that the trial judge sustained the government's objections to the introduction of evidence as to the 1976 return both during defense counsel's cross-examination of Larva (Tr. 58-59) and during his direct examination of petitioner (Tr. 154, 156, 160, 164, 167, 183) because such evidence concerned a year (1976) other than one of the prosecution years. As we have noted (*supra*, pages 2-3), Larva's discovery of the Mellon Account required him to recalculate income for the first six months of 1976. The 1976 return would not have been prepared until some nine or ten months later and could not have shed any light on petitioner's intent when he filed the returns for the indictment years.[3]

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[3] *United States* v. *Moody*, 339 F. 2d 161 (6th Cir. 1964), upon which petitioner relies (Pet. 17-19), is not to the contrary. There, the government used the bank deposits method to prove an understatement of

3. Finally, petitioner argues (Pet. 20-21) that all of the trial court's exclusions of evidence denied him due process "as he was powerless to advance any corroborative contention that he had no intention to evade his income taxes for the single year (1975) of which he was convicted." The record, however, shows that petitioner testified (Tr. 142-215) at length regarding his intentions in opening and using the Mellon Account and his reasons for computing gross receipts for his return preparer in the unusual manner in which it was done.

At all events, even on the assumption that the trial judge erred in excluding such evidence, that error was harmless under Rule 52, Fed. R. Crim. P., in view of the overwhelming evidence of petitioner's guilt on Count Three of the indictment. By the admission of petitioner's own expert, after making a number of doubtful exclusions of alleged non-income items from total deposits, there still was unreported taxable income for 1975 in the sum of $58,743.97, a figure almost twice as large as reported taxable income for that year ($32,662.79) (Tr. 238). Furthermore, petitioner not only concealed vital information from Larva (see *United States* v. *Pepe*, 360 F. 2d 1015, 1016-1017 (3d Cir. 1966); *United States* v. *Daniels*, 617 F. 2d 146, 149 (5th Cir. 1980)), but he also supplied him with false figures as to his

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income. The trial judge in *Moody* erroneously refused to admit, except to negate willfulness, a net worth computation showing no understatement of income and that the defendant owed no tax for the indictment years. Here, however, petitioner did not offer a net worth computation to dispute the proof that he had understated income and that there existed a tax deficiency in the indictment years, but rather used the same method of proof as the government, *i.e.*, the bank deposits method. *Moody* does not support a defense based upon a hypothetical shift from the cash to the accrual method of accounting, nor is it authority for the introduction by the defense of returns for years other than indictment years.

monthly gross receipts. Such deception resulted both in the understatement of income on his federal income tax returns, and in the understatement of his gross sales on the sales tax returns filed with the Pennsylvania Department of Revenue (Tr. 20-24). See *Spies* v. *United States,* 317 U.S. 492, 499 (1943); *Holland* v. *United States,* 348 U.S. 121, 139 (1954). The admission of all of the evidence cited by petitioner would not have lessened the impact of the substantial proof of petitioner's guilt and would not have affected the jury's verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981